



Federal Communications Commission
Washington, D.C. 20554

July 23, 2007

DA 07-3358

Don Schellhardt
P.O. Box 9536
Roanoke, VA 24020

Dear Mr. Schellhardt:

This is in response to the petition¹ that you filed on behalf of Hams for Action (HFA) for reconsideration of a February 28, 2007 decision by the Wireless Telecommunications Bureau, Mobility Division (Division).² The Division denied HFA's request that the Commission adopt rules preempting certain homeowner's association covenants, conditions, and restrictions (CC&Rs) in deeds and bylaws that prevent amateur radio operators from installing antennas and antenna support structures where they reside. For the reasons set forth below, we deny the petition.

As the Division noted, the Commission previously addressed the question of whether to preempt CC&Rs that restrict the installation of antennas and associated support structures used by amateur radio stations. In the *PRB-1* decision, the Commission established a policy of limited preemption of state and local regulations governing amateur station facilities, but chose not to extend its limited preemption policy to CC&Rs because "[s]uch agreements are voluntarily entered into by the buyer or tenant when the agreement is executed and do not usually concern the Commission."³ In 2001, the Commission reaffirmed its decision not to preempt CC&Rs, stating that "the Commission's [*PRB-1*] decision was premised upon the fundamental difference between state and local regulations, with which an amateur operator must comply, and CC&Rs, which are the product of a voluntary agreement involving the amateur operator."⁴ In light of this

¹ Petition for Reconsideration by Hams for Action (HFA) of the Commission Staff's Decision in DA 07-898 (filed April 5, 2007) (Petition).

² Don Schellhardt, *Letter*, 22 FCC Rcd 4025 (WTB MD 2007) (*Division Letter*). The Petition requests review of the Division's decision by the full Commission. See Petition at 1. Under the Commission's Rules, a petition for reconsideration of actions taken pursuant to delegated authority will be acted on by the designated authority unless referred by that authority to the Commission. See 47 C.F.R. §§ 1.106(a)(1), 1.429(a). Because HFA offers no specific grounds for why referral to the full Commission would be appropriate, we decline to exercise our discretion to refer the Petition, and will instead address it on delegated authority. See Comcast Cablevision of Detroit, Inc., *Memorandum Opinion and Order on Reconsideration*, 16 FCC Rcd 13287, 13287 n.1 (CSB 2001) ("The City Petition is filed pursuant to 47 C.F.R. § 1.106 and directed to the Commission. Because section 1.106(a)(1) provides that a petition for reconsideration of actions taken pursuant to delegated authority will be acted on by the designated authority unless referred by that authority to the Commission, the Cable Services Bureau is the appropriate authority to address the City Petition.").

³ Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, *Memorandum Opinion and Order*, PRB-1, 101 F.C.C. 2d 952, 960 n.6 (1985) (*PRB-1*).

⁴ Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antenna and Support Structures, and Amendment of Section 97.15 of the Commission's Rules

authority, the Division concluded that HFA had not presented grounds for the Commission to revisit this policy.⁵ It noted that HFA's proposal differed from previous requests in that HFA proposed that the Commission preempt CC&Rs only when the amateur operator is an emergency communications operator (ECO), and that HFA proposed specific guidelines to define reasonable accommodation, but the Division concluded that these distinctions did not address the Commission's primary reason for excluding CC&Rs from its limited preemption policy—that they are private contractual agreements with which the Commission is reluctant to interfere.⁶

In the instant petition, HFA challenges the depiction of all CC&Rs as voluntary, because some jurisdictions require housing developments to adopt CC&Rs and other areas have little or no housing available that is not subject to CC&Rs.⁷ It also asserts that the Division should have recognized that its proposal to tailor the preemption of CC&Rs only with respect to ECOs constituted a relevant change in circumstances since the Commission last considered the issue, especially in light of subsequent national and international disasters of unprecedented scope.⁸ We note, however, that when the Commission adopted its limited preemption policy, it took into account both the fact that amateurs seeking to avoid being subject to CC&Rs may find their housing choices limited in some places,⁹ and the role played by amateur operators during emergencies.¹⁰ Thus, these do not constitute changed circumstances that merit a notice of proposed rulemaking regarding HFA's proposal.¹¹

Governing the Amateur Radio Service, *Memorandum Opinion and Order*, 17 FCC Rcd 333, 335 ¶ 6 (2001) (*MO&O*), *aff'g Order on Reconsideration*, 15 FCC Rcd 22151 (WTB 2000), *aff'g Order*, 14 FCC Rcd 19413 (WTB 1999), *recon. dismissed*, 17 FCC Rcd 19408 (WTB PSPWD 2002).

⁵ See *Division Letter*, 22 FCC Rcd at 4026.

⁶ *Id.* Additionally, while HFA proposed to preempt contractual terms only when one party is an ECO, it neither proposed to permit use of such an amateur station only for emergency communications nor suggested how such a limitation could be enforced.

⁷ See *Petition* at 3-5. HFA suggests that CC&Rs should not be deemed voluntary when eighty percent or more of all housing developments within a ten-mile radius are subject to CC&Rs that prevent amateur radio operators from installing antennas and antenna support structures. *Id.* at 5.

⁸ See *id.* at 2.

⁹ See *PRB-I*, 101 F.C.C. 2d at 954 ¶ 8.

¹⁰ *Id.* at 954 ¶¶ 10-12, 958 ¶ 24; *MO&O*, 17 FCC Rcd at 334-35 ¶ 5. We also note that there has been no showing that the communications provided by amateur radio operators during incidents such as earthquakes and hurricanes have been adversely affected by residential CC&Rs. Rather, communications from areas affected by disasters typically occur from transmitters that are not subject to CC&Rs, such as mobile or hand-held radios, or temporarily from buildings such as schools, shelters, or government locations. Accordingly, we do not believe that anticipation of disaster events is grounds for the Commission to revisit a policy that applies to an amateur radio operator's ability to install antennas and antenna support structures where they reside.

¹¹ HFA also suggests that the fact that none of the present Commissioners was in office when the Commission adopted its limited preemption policy is a reason to revisit it. See *Petition* at 2. We disagree. Commission policy is presumed to survive changes in the membership of the Commission until the Commission indicates otherwise. See *WHJB, Inc., Decision*, 39 F.C.C. 2d 296, 309 (Rev. Bd. 1973) (concurring opinion).

Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.429(a) of the Commission's Rules, 47 C.F.R. § 1.429(a), the Petition for Reconsideration of the Commission Staff's Decision in DA 07-898 filed on April 5, 2007 by Hams for Action IS DENIED.

This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131 and 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Scot Stone
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau